Supreme Court, U.S.
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No. 07-

IN THE
**SUPREME COURT OF THE UNITED STATES**

RONALD MICHAELS AND
DOLORES MICHAELS,

*Petitioners*,

v.

TOWNSHIP OF MACOMB,

*Respondent.*

**On Petition for a Writ of Certiorari to the State of Michigan Supreme Court**

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether petitioners were denied their rights to due process under the Fifth Amendment and the Fourteenth Amendment Due Process Clause by a state court order holding them in contempt for not complying with a consent judgment and imposing fines and incarceration, where the state court ruled without affording petitioners a due process hearing and without any evidence in the record before the state court, and where respondent's motion for an order finding petitioners in contempt did not comply with the state court rules.

## PARTIES TO THE PROCEEDING

Petitioners Ronald Michaels and Dolores Michaels were defendants-appellants below.

Respondent the Township of Macomb, Michigan was the plaintiff-appellee below.

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## DECISIONS BELOW

The decision of the Michigan Supreme Court, App. 1a, is unreported. The decision of the Michigan Court of Appeals, App. 3a, is unreported. The underlying decision of the Macomb County, Michigan Circuit Court, App. 5a-12a, is unreported.

## JURISDICTION

The order of the Michigan Supreme Court denying discretionary review of the March 28, 2008 order of the Michigan Court of Appeals was entered on April 11, 2008. This Court has jurisdiction to review this decision under 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall ... be deprived of life, liberty, or property, without due process of law...."

The Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law ...."

## STATEMENT OF THE CASE

This petition seeks review of the decision of the Michigan Supreme Court denying petitioners' application for leave to appeal the March 28, 2008 order of the Michigan Court of Appeals, which denied petitioners' application for leave to appeal from the February 27, 2008 order of the Macomb County, Michigan Circuit Court finding petitioners in contempt of court for not complying with a June 30, 2004 consent judgment and imposing fines and possible incarceration. Absent review by this Court, state courts will

be permitted to find parties in contempt of court for actions that occurred outside the presence of the court and impose monetary fines and incarceration without holding any evidentiary hearing or without requiring that the record contain some evidence presented under oath of the actions which are alleged to be the basis for the order of contempt.

This Court's intervention is required because the state court rulings on which petitioners seek review violate petitioners' due process rights under the Fifth and Fourteenth Amendments, and are directly contrary to this Court's decisions upholding the guarantees of due process in the Fifth and Fourteenth Amendments before a party can be deprived of property through monetary fines and liberty through incarceration. This becomes even more evident in view of this Court's decisions that a contempt proceeding in which the court imposes fines for past conduct, which the contemnor could not reduce by future compliance with the court's order, should be viewed as criminal rather than civil in nature.

Review is also warranted because the decision below is mistaken in three fundamental respects. First, the Michigan appellate courts erred in not holding that the Macomb County Circuit Court lacked jurisdiction over petitioners as to the contempt issue because respondent had not complied with the procedures set forth in state court rules as to contempt proceedings. Second, the state appellate courts erred in not finding that the Macomb County Circuit Court abused its discretion and violated petitioners' due process rights when it find petitioners in contempt of court without an evidentiary hearing. Third, the Macomb County Circuit Court abused its discretion and violated petitioners' due process rights when it ordered that petitioners could serve jail time without holding an evidentiary hearing and without making a determination as to whether petitioners could comply with the contempt order or what was the

character and magnitude of the harm threatened by continued contumacy.

1. Respondent the Township of Macomb, Michigan initiated the underlying lawsuit against petitioners Ronald Michaels and Dolores Michaels on September 20, 1995. On June 30, 2004 the parties agreed to a consent judgment, App. 13a-15a, which was entered by the Macomb County, Michigan Circuit Court on June 30, 2004. One of the terms of the consent judgment was that petitioners would remove all "composting materials" from their composting operation no later than December 31, 2007. App. 14a.

Relevant portions of the consent judgment are:

> 1. The defendants, RONALD and DOLORES MICHAELS, shall permanently cease receiving from off-site sources, leaves, grass, yard clippings, and other compostible [*sic*] materials at their farm in Macomb Township and the composting site will be closed as of December 31st, 2005.
>
> 2. All composting materials shall be removed from the composting operation no later than December 31st, 2007.
>
> * * * * * *
>
> 5. Any finished compost may be removed in bulk from the site and sold commencing with the effective date of this Consent Judgment.

App. 13a-15a.

2. On November 28, 2007, petitioners filed with the Macomb County Circuit Court a satisfaction of the

consent judgment, affirmatively stating that all composting materials had been removed from the site. On December 12, 2007, respondent filed objections to the satisfaction of the consent judgment, but did not file a motion to set aside the satisfaction of judgment or take any other action. Respondent also did not have anyone come to petitioners' composting site to confirm whether petitioners had removed all composting material from the site as they had stated in the satisfaction of consent judgment.

2. On January 7, 2008, respondent filed a motion for an order finding petitioners in contempt because they did not remove all composting materials from the site on which petitioners had located their compost operation by December 31, 2007. This motion was not supported by any affidavit or other evidence as to what composting materials allegedly remained on the site after December 31, 2007, but merely contained assertions made by counsel for respondent, who had not even been to the site between November 28, 2007 and the date of the filing of the motion on January 7, 2008 or the date of oral argument on the motion, which was held on January 14, 2008. Respondent did not file a motion to show cause or support its motion for contempt with any affidavit. Respondent's contempt motion did not specify whether it was seeking criminal or civil contempt sanctions. Respondent did not personally serve petitioners with the contempt motion, but instead just sent a copy of the motion by mail to petitioners' prior counsel.[1]

It is undisputed that the Macomb County Circuit Court never held an evidentiary hearing on respondent's motion or to determine whether petitioners, as the alleged contemnors, actually committed contempt.

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[1] Respondent did not even comply with M.C.R. 2.119(C)(1)(a), which requires 9 days' notice of a hearing if a motion is served by mail on opposing counsel.

The Macomb County Circuit Court issued its opinion and order finding petitioners in contempt of court on February 27, 2008. App. 5a-12a. In its opinion and order, the Macomb County Circuit Court held that the language of the consent judgment - as a contract - was unambiguous, and then made determinations as to petitioners' intent in entering into that consent judgment, without any basis of fact in the record before the court. The Macomb County Circuit Court ordered petitioners to pay a fine of $250 for each day after December 31, 2007 through February 27, 2008 (the date of the order) and every day thereafter that petitioners allegedly were not in compliance with the consent judgment, and ordered petitioners held in jail after thirty (30) days from the date of the order if they still had not complied with the court's order, as well as pay respondent's fees and costs for bringing the contempt motion. App. 5a-12a.

On March 17, 2008, the Macomb County Circuit Court declined to reconsider its opinion and order and denied petitioners' motion for stay of proceedings pending appeal.

3. Petitioners filed an emergency application for leave to appeal, which petitioners were required to do because the state appellate courts considered the order finding petitioners in contempt to be a post-judgment order from which there was no appeal as of right. Respondent contended in its opposition pleadings that no evidentiary hearing was required before a trial court could hold a defendant in contempt for alleged actions which were committed outside the immediate presence of the court. The Michigan Court of Appeals on March 28, 2008 granted the application in part to modify the fine from $250 a day, with no limitation, to $7,500, the statutory maximum fine provided in M.C.L. 600.1715(1), but denied the remainder of the application on the merits. App. 3a.

4. Petitioners then filed with the Michigan Supreme Court an emergency application for leave to appeal

from the Michigan Court of Appeals' March 28, 2008 order. The Michigan Supreme Court denied the application for leave to appeal on April 11, 2008. App. 1a.

## REASONS FOR GRANTING THE PETITION

This Court has long upheld the guarantees in the Fifth and Fourteenth Amendments to the United States Constitution that a person shall not be deprived of liberty or property without due process of law. These guarantees extend as well to proceedings alleging contempt outside the immediate presence of the court, particularly where the penalties for a finding of contempt include more than just *de minimis* prospective fines and incarceration.

However, in the rulings on which petitioners seek review before this Court, petitioners were deprived of their property through monetary fines and face deprivation of their liberty through incarceration without any court holding an evidentiary hearing, or having before it any evidence whatsoever, to support respondent's allegation that petitioners were in contempt of the June 30, 2004 consent judgment. Despite petitioners bringing the fact that they were deprived of liberty and property without due process of law before the Michigan Court of Appeals and the Michigan Supreme Court, these courts did not set aside the ruling of the Macomb County Circuit Court, or even remand the case back to the Macomb County Circuit Court to have that court hold an evidentiary hearing. Indeed, the Michigan Court of Appeals found that petitioners' application for leave to appeal lacked merit on respondent's argument that no evidentiary hearing or the taking of evidence is required before holding a party in contempt for actions allegedly committed outside the immediate presence of the court. Petitioners have been deprived of their constitutional rights and have no other recourse. This Court should grant review of this petition because the ruling of the state court in this matter clearly decides an important question of federal

constitutional law in a way that directly conflicts with decisions of this Court.

## I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF THIS COURT

Michigan's failure to hold an evidentiary hearing, or require that the record contain any relevant and admissible evidence, before finding petitioners in contempt for allegedly not complying with a term in the June 30, 2004 consent judgment is incompatible with this Court's decisions upholding the guarantees found in the Fifth and Fourteenth Amendment of due process before a court can order deprivation of liberty and property in contempt proceedings.

While the order of the Macomb County Circuit Court purports to assess against petitioners a civil, as opposed to a criminal, sanction for petitioners' alleged failure to comply with this consent judgment, this Court's decision in *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), makes it clear that the Macomb County Circuit Court's order instead imposed a criminal sanction. While both civil and criminal sanctions for contempt can be imposed only after constitutional safeguards have been observed, there are heightened constitutional protections for criminal proceedings.

This Court in *Bagwell* stated initially that "[w]e are called upon once again to consider the distinction between civil and criminal contempt. Specifically, we address whether contempt fines levied against a union for violations of a labor injunction are coercive civil fines, or are criminal fines that constitutionally could be imposed only through a jury trial." *Id.* at 823. This Court recognized that it previously held that

> "Criminal contempt is a crime in the ordinary sense," *Bloom v. Illinois*, 391 U.S. 194, 201 (1968), and "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Hicks v. Feiock*, 485 U.S. 624, 632 (1988). ... In contrast, civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.

512 U.S. at 826-27. This Court turned to that which distinguished between civil and criminal contempt, and cited its earlier decision in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911), in which this Court

> emphasized that whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."

512 U.S. at 827-28 (quoting *Gompers, supra*).

This Court recognized that "[m]ost contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender's future obedience." *Id.* at 828. As it found in its prior holding in *Hicks v. Feiock*, 485 U.S. 624 (1988),

> conclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from "the subjective intent of a State's laws and its courts," but "from an examination of the character of the relief itself."

*Id.* (quoting *Hicks*, 485 U.S. at 636). In applying this analysis to contempt fines, this Court found that

> A contempt fine accordingly is considered civil and remedial if it either "coerces the defendant into compliance with the court's order, [or] ... compensates the complainant for losses sustained." *United States v. Mine Workers*, 330 U.S. 258, 303-304 (1947). Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. *See Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 590 (1947). Thus, a "flat, unconditional fine" totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance. *Id.* at 588.

*Id.* at 829. This Court also recognized that if the trial court in the case before it had simply levied fines after finding the union guilty of contempt, the resulting "determinate and unconditional" fines would be considered "solely and exclusively punitive." *Id.* at 836 (quoting *Hicks*, 485 U.S. at 632-33).

This Court then addressed the procedural protections afforded when a contempt occurs outside the immediate presence of a court. It stated clearly that "[s]ummary adjudication of indirect contempts is prohibited." *Id.* at 833 (citing *Cooke v. United States*, 267 U.S. 517, 534 (1925).

This Court affirmed in *Pounders v. Watson*, 521 U.S. 982 (1997) that a party facing a charge of contempt is entitled to due process through a hearing, the presence of counsel and an opportunity to call and examine witnesses. This Court in prior rulings limited summary contempt orders, in which the party is not afforded a due process evidentiary hearing, only to cases in which the party committed misconduct in the presence of the court and which disturbed the court's business:

> We have held the summary contempt exception to the normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses, "includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In re Oliver*, 333 U.S. 257, 275 (1948) (quoting *Cooke* [*v. United States*, 267 U.S. 517,] 536 [(1925)].
>
> We have stressed the importance of confining summary contempt orders to misconduct occurring in court. Where misconduct occurs in open court, the affront to the court's dignity is more widely observed, justifying summary vindication. *See In re Green*, 369 U.S. 689, 692 (1962) (relying on due process cases); *Harris v. United States*, 382 U.S. 162, 164 (1965) (defining boundary between summary and ordinary contempt under Fed. Rule Crim. Proc. 42).

521 U.S. at 988.

This Court's rulings clearly provide that petitioners were entitled to due process through a hearing and an opportunity to call witnesses before the state court found them in contempt of court. Further, the Macomb County Circuit Court assessment on February 27, 2008 of a fine from January 1, 2008 until the date of the order, February 27, 2008 was punitive in nature, since the fine was paid to the court, not respondent as complainant, and was a fine which petitioners could not reduce or avoid through future compliance. Given the punitive nature of this fine, the contempt proceedings were accordingly criminal in nature, and petitioners should have been afforded the heightened constitutional protections which are afforded in criminal proceedings, beyond simply an evidentiary hearing and the opportunity to call witnesses. The decision of the court below is a marked departure from this Court's rulings and departs completely from this Court's decisions on the important question of due process rights guaranteed under the federal constitution. Only this Court can resolve this conflict between this Court's rulings and Michigan's decisions in this case as to whether a party is entitled to due process protection through an evidentiary hearing or the requirement that there be present in the record admissible and relevant evidence, at a very minimum, before a state court can find that party in contempt of court for an alleged action that occurred outside the immediate presence of the court.

## II. THIS COURT SHOULD GRANT REVIEW IN ORDER TO HALT MICHIGAN'S UNCONSTITUTIONAL FINDING OF CONTEMPT WITHOUT AFFORDING THE ALLEGED CONTEMNOR DUE PROCESS AND BECAUSE THE DECISION BELOW IS WRONG

Petitioners submit that review is also warranted because the ruling below is wrong on the merits. First, the Michigan appellate courts erred in not holding that the Macomb County Circuit Court lacked jurisdiction over petitioners as to the contempt issue because respondent had not complied with the procedures set forth in state court rules as to contempt proceedings. Second, the state appellate courts erred in not finding that the Macomb County Circuit Court abused its discretion and violated petitioners' due process rights when it find petitioners in contempt of court without an evidentiary hearing. Third, the Macomb County Circuit Court abused its discretion and violated petitioners' due process rights when it ordered that petitioners could serve jail time without holding an evidentiary hearing and without making a determination as to whether petitioners could comply with the contempt order or what was the character and magnitude of the harm threatened by continued contumacy.

### A. The Macomb County Circuit Court Lacked Jurisdiction Over Petitioners Because Respondent Failed To Comply With The State Court Rules As To Contempt Proceedings

The state courts below erred in denying petitioners' applications for leave to appeal and the relief petitioners requested therein, since the Macomb County Circuit Court lacked jurisdiction over petitioners by respondent's failure to comply with the procedures set forth in state court rules governing contempt proceedings. The register of actions and record make clear that respondent failed to comply with M.C.R. 3.606, the state court rule as to contempt proceedings, because it did not institute the contempt proceedings with a motion to show cause or support its motion for contempt with any affidavit. Additionally, respondent did not fulfill its obligation to advise petitioners as to whether the contempt being alleged was criminal or civil in nature. Further, respondent did not serve its motion by personal service on petitioners, the alleged contemnors, as required when the alleged contempt consists of disobeying an order of the court. Accordingly, because of the numerous procedural defects, the courts below could not have found that the circuit court had jurisdiction over petitioners, and thus the circuit court could not have entered its opinion and order finding petitioners in contempt of the consent judgment.

It is not disputed that the contempt which respondent alleges that petitioners committed -- not complying with a consent judgment -- occurred outside the immediate presence of the circuit court. M.C.R. 3.606 provides, in pertinent part:

> Contempts Outside Immediate Presence of Court

> (A) Initiation of Proceedings. For a contempt committed outside the immediate view and presence of the court, on a proper showing on ex parte motion supported by affidavits, the court shall either
>
> (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct; ....

The court rule thus mandates that a party seeking to have a court hold another party in contempt must either file a motion for an order to show cause or a motion for contempt which is supported by affidavits. As the court stated in *In re Contempt of Robertson*, 209 Mich. App. 433, 531 N.W.2d 763 (1995),

> Contempt proceedings for contempts committed outside the immediate view and presence of the [judge] must be initiated through an ex parte motion supported by an affidavit of facts showing the alleged contemptuous conduct. MCR 3.606(A).

*Id.*, 209 Mich. App. at 438-39. *Accord In re Contempt of McRipley*, 204 Mich. App. 298, 301, 514 N.W.2d 219 (1994); *In re Contempt of Nathan*, 99 Mich. App. 492, 495, 297 N.W.2d 646 (1980).

Respondent's motion for an order finding petitioners in contempt failed to comply with M.C.R. 3.606. Respondent's motion was not a motion for an order directing petitioners to show cause why they should not be held in contempt. Instead, it is a motion alleging contempt

purportedly occurring outside the immediate presence of the trial court, which is supported only by hearsay statements of counsel in the motion itself. The record is clear, and respondent cannot dispute, that respondent never attached to its contempt motion any affidavit, as required by M.C.R. 3.606(A).

The court in *S. Abraham & Sons, Inc. v. Dept. of Treas.*, 260 Mich. App. 1, 677 N.W.2d 31 (2003), addressed this very issue, and determined:

> defendant's alleged disobedience of the Court of Claims order occurred outside the court's presence, requiring compliance with the procedures detailed in MCR 3.606. *Auto Club Ins Ass'n, supra* at 712-713, 718; see also MCL 600.1711. Contrary to MCR 3.606, plaintiffs did not institute the contempt proceedings with a motion to show cause or support their motions for contempt with affidavits (other than an affidavit supporting the amount of attorneys fees requested). As such, the trial court lacked jurisdiction over defendant.

*Id.*, 260 Mich. App. at 24 n.11.

Likewise in the case at bar, respondent did not institute the contempt proceedings with a motion to show cause or support its motion for contempt with an affidavit. Accordingly, the Macomb County Circuit Court lacked jurisdiction over petitioners and therefore wrongfully issued its opinion and order holding petitioners in contempt. The state appellate courts erred in not setting aside this contempt order for lack of jurisdiction and failure to comply with the mandatory procedures set forth in the state court rules.

Additionally, respondent committed other procedural defects in its motion for contempt, which also operated to make the Macomb County Circuit Court lack jurisdiction over petitioners. First, respondent's motion for contempt did not state whether the alleged contempt was criminal or civil in nature. Second, respondent failed to serve its contempt motion on petitioners personally.

The court in *S. Abraham & Sons, Inc.* addressed these issues as well, and found that the failure of the plaintiffs in that case to fulfill their obligation to advise the defendant whether the contempt being alleged was civil or criminal in nature and to serve the contempt motion on defendant personally were procedural defects which tainted the contempt hearing, mandating that the order of contempt be reversed. 260 Mich. App. at 24 n.11. *Accord In re Contempt of Auto Club Ins. Ass'n.*, 243 Mich. App. 697, 716, 624 N.W.2d 443 (2000); *In re Contempt of Robertson,* 209 Mich. App. 433, 438, 531 N.W.2d 763 (1995). The court stated specifically in *In re Contempt of Steingold*, 244 Mich. App. 153, 624 N.W.2d 504 (2000):

> Additionally, when contempt proceedings for violating a court order are initiated, the notice or order must be personally served on the alleged contemnor. MCL 600.1968(4); MSA 27A.1968(4); MCR 2.107(B)(1)(b).

*Id.*, 244 Mich. App. at 158.

It is also undisputed that respondent never stated in its contempt motion at any place whether the contempt which respondent alleged was criminal or civil in nature. It is further undisputed, and review of the record reflects, that respondent did not serve petitioners personally with the motion for contempt, but only sent a copy of it by mail to the attorney who was petitioners' counsel at the time of the June, 2004 consent judgment. Thus, because of these procedural

defects respondent's motion for contempt was not properly before the Macomb County Circuit Court. The state appellate courts therefore erred in not setting aside the contempt order.

Accordingly, because respondent did not initiate contempt proceedings by filing a motion for an order compelling petitioners to show cause as to why they should not be held in contempt, or by filing an affidavit with its contempt motion, as MCR 3.606 requires, and because respondent did not state anywhere in its motion whether the contempt it alleged that petitioners committed was civil or criminal in nature, and because respondent did not personally serve petitioners with the contempt motion, the state appellate courts erred in not holding that the lacked jurisdiction over petitioners and could not have issued an order holding petitioners in contempt of court. Petitioners therefore respectfully request that this Court grant review in this case.

### B. The Macomb County Circuit Court Abused Its Discretion And Violated Petitioners' Due Process Rights When It Found Petitioners In Contempt Without Holding An Evidentiary Hearing

The lower courts also erred in denying petitioners' application for leave to appeal, since the Macomb County Circuit Court abused its discretion and violated petitioners' due process rights in finding petitioners in contempt of court without an evidentiary contempt hearing, which would have afforded petitioners the due process for which the Due Process Clause provides. Instead, without any sworn affidavits or other admissible evidence before the court or evidence taken at an evidentiary hearing, the Macomb County Circuit Court made certain "findings" and based on those "findings," found petitioners in contempt, imposed a fine of $250 a day from January 1, 2008 until February 27,

2008, and for each day thereafter that petitioners were allegedly not in compliance with the consent judgment, and jail confinement after 30 days of non-compliance with the circuit court's order.

Under Michigan law, contempt of court is a willful act, omission, or statement that tends to impair the authority or impede the functioning of a court. *In re Contempt of Robertson*, 209 Mich. App. 433, 436, 531 N.W.2d 763 (1995); *Pontiac v. Grimaldi*, 153 Mich. App. 212, 215, 395 N.W.2d 47 (1986). As the court stated in *In re Contempt of Auto Club Ins. Ass'n.*, 243 Mich. App. 697, 624 N.W.2d 443 (2000),

> The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, *i.e.*, the court rules and court orders, or compensate the complainant. *In re Contempt of Robertson*, [*supra*].... Because the power to hold a party in contempt is so great, it "carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown."

*Id.*, 243 Mich. App. at 708 (*citing People v. Matish*, 384 Mich. 568, 572, 184 N.W.2d 915 (1971)).

Similar to this Court's determination in *Bagwell*, the state court in *In re Contempt of Auto Club Ins. Ass'n.* made clear that

> The trial court must carry out the proper procedures before it can issue the order holding an individual or party in contempt of

> court in order to carry out its goal of *coercing* particular action or *punishing* a misdeed.

*Id.*, 243 Mich. App. at 711 (emphasis in original).

According to the court in *In re Contempt of Auto Club Ins. Ass'n.*,

> If the contemptuous conduct occurs outside the court's direct view, *i.e.*, it is "indirect" contempt, the court must hold a hearing to determine whether the alleged contemnor actually committed contempt. This hearing must follow the procedures established in M.C.R. 3.606 and afford some measure of due process before the court can determine whether there is sufficient evidence of contempt to warrant sanctions.

*Id.*, 243 Mich. App. at 712-13. *Accord In re Collins*, 329 Mich. 192, 196, 45 N.W.2d 31 (1950); *In re Contempt of Robertson*, 209 Mich. App. 433, 438, 440, 531 N.W.2d 763 (1995); *Fraternal Order of Police, Lodge #98 v. Kalamazoo Co.*, 82 Mich. App. 312, 315-16, 266 N.W.2d 805 (1978); *In re Henry*, 32 Mich. App. 654, 659, 189 N.W.2d 96 (1971). In *In re Contempt of Robertson*, the court stated:

> These minimal due process safeguards require that an accused be given a reasonable time in which to prepare a defense to the contempt charge.

*Id.*, 209 Mich. App. at 438.

Michigan case authority decided prior to the case at bar held that a hearing on an allegation of contempt must be more than summary proceeding or hearing on a motion; the rules of evidence apply at the hearing regarding the contempt

charges. *In re Contempt of Robertson*, 209 Mich. App. at 439. The standard of proof is more stringent than in other civil actions; proof of contempt must be clear and unequivocal. *People v. Matish*, 384 Mich. 568, 572, 184 N.W.2d 915 (1971); *In re Contempt of Robertson*, 209 Mich. App. at 439; *Detroit Bd. of Ed. v. Detroit Federation of Teachers*, 55 Mich. App. 499, 505-06, 223 N.W.2d 23 (1974). Thus, the court found in *In re Contempt of Robertson* that, where the order of contempt was based on the representations of plaintiff's counsel made at a motion hearing -- as in the case at bar -- and not through an evidentiary hearing, there was not sufficient evidence to support an order of contempt because the finder of fact had not gained personal knowledge of the contempt. *In re Contempt of Robertson*, 209 Mich. App. at 440-41.

This state case authority concords with the decisions of this Court which petitioners have set forth in Section I, *supra*. Petitioners were entitled to due process which the federal constitutional guaranteed them before they could be found in contempt of court.

It cannot be disputed in the case at bar that the Macomb County Circuit Court did not hold an evidentiary hearing or require the submission of any sworn evidence before holding petitioners in contempt. There was no sworn evidence in the record before the circuit court, as respondent had not even attached an affidavit to its contempt motion.

The circuit court did not convene a hearing but simply heard oral arguments of counsel, which could only be, at best, hearsay statements, and then made "findings" based on respondent's counsel's representations (even though neither he nor anyone from the Township had actually gone to petitioners' site to see whether composting materials in fact remained on the site).

The circuit court first reviewed the consent judgment as a whole, and determined that the terms of the consent judgment, as a contract, were unambiguous. App. 8a. It has long been established in Michigan that when construing contracts, courts are not called upon to re-make the contracts for the parties, but rather to ascertain the contracts' provisions and to enforce them. *Thayer v. Augustine*, 55 Mich. 187, 20 N.W. 898 (1884). Courts must take written instruments as they come to them and whether carefully prepared or thrown together haphazardly, determine their legal effect and if valid, enforce them. *Stout v. Hallsted*, 239 Mich. 81, 214 N.W. 160 (1927). In *Cottrill v. Mich. Hosp. Svc.*, 359 Mich. 472, 102 N.W.2d 179 (1960), the court clearly stated:

> It is elementary that contracts ... which are unambiguous are not open to construction and must be enforced as written. *Harrington v. Inter-State Business Men's Accident Ass'n.*, 210 Mich. 327, 178 N.W. 19 (1920).

*Id.*, 359 Mich. at 475. It is *only* upon a determination by a court that a particular contract is indeed ambiguous that the court then must consider the rules of contract construction. As the court stated in *William C. Roney & Co. v. The Fed. Ins. Co.*, 674 F.2d 587 (6th Cir. 1982), relying on the Michigan Supreme Court's decision in *New Amsterdam Casualty Co. v. Sokolowski*, 374 Mich. 340, 132 N.W.2d 66 (1965):

> As a prerequisite to applying rules of construction, a contract must be ambiguous, in that the parties' expressions are subject to more than one logical interpretation; otherwise, it is to be construed according to the plain meaning of the terms. *New Amsterdam Casualty Co. v. Sokolowski*, 374 Mich. 340, 132 N.W.2d 66 (1965).

647 F.2d at 589.

In the case at bar, the circuit court determined that the consent judgment was unambiguous. Accordingly, the trial court did not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning. *Zurich Ins. Co. v. CCR & Co.*, 226 Mich. App. 599, 604, 576 N.W.2d 392 (1997) (quoting *Mich. Chandelier Co. v. Morse*, 297 Mich. 41, 49, 297 N.W. 64 (1941) (citation omitted). Reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. *Henderson v. State Farm Fire & Cas. Co.*, 460 Mich. 348, 354, 596 N.W.2d 190 (1999).

The circuit court correctly stated the case authority, but then inexplicitly failed to follow that authority as to interpretation of the "contract" set forth in the consent judgment. The circuit court, after finding the contract unambiguous, still attempted to set forth the perceived intent of petitioners at the time of formation of the consent judgment. App. 8a. However, the trier of fact is to determine the intent of the parties only if the meaning of an agreement is ambiguous or unclear. *Chrysler Corp v. Brencal Contractors, Inc.*, 146 Mich. App. 766, 775, 381 N.W.2d 814 (1985).

Most importantly, the circuit court did not have before it in the record through submission by the parties or through an evidentiary hearing any evidence from which it could make its factual findings as to the parties' intent. Without such evidence, there was no basis for the circuit court to make its factual findings, which compounds the denial to petitioners of their due process rights. Thus, there was no "clear and unequivocal" proof of contempt before the circuit court from which it could determine that petitioners

should be held in contempt. Simply, petitioners were never afforded the due process to which they were entitled.

This becomes even more egregious when viewed in the light of this Court's decision in *Bagwell*. Since the fine which the Macomb County Circuit Court imposed was for a two month period which had already occurred, there was no way in which petitioners could purge themselves and avoid this fine by future compliance, and this fine was therefore punitive in nature under this Court's definition in *Bagwell* and preceding cases. Since the fine was punitive, the contempt proceedings were criminal, not civil, in nature, and petitioners were entitled to the due process protections afforded to defendants in criminal proceedings. Yet petitioners did not even receive the barest minimum of due process before the Macomb County Circuit Court found them in contempt and assessed fines and possibly incarceration. The decisions below therefore unconstitutionally violate petitioners' due process rights.

Accordingly, because the Macomb County Circuit Court did not afford petitioners due process by conducting an evidentiary hearing on respondent's motion for contempt (assuming that the circuit court had jurisdiction over that motion) and because the record contains no sworn testimony that comports with the rules of evidence from which the circuit court could have made findings of fact, the circuit court abused its discretion and violated petitioners rights to due process by issuing an order holding petitioners in contempt of court, the state appellate courts erred in not setting aside the contempt order. Petitioners therefore respectfully request that this Court grant review in this case.

### C. The Macomb County Circuit Court Abused Its Discretion And Violated Petitioners' Due Process Rights When It Ordered That Petitioners Could Spend Time In Jail For The Alleged Contempt

The lower courts further erred in denying petitioners' application for leave to appeal, since the Macomb County Circuit Court abused its discretion and violated petitioners' rights to due process when it ordered that petitioners could spend time in jail without holding an evidentiary hearing and without making a determination as to whether petitioners could comply with the contempt order or what was the character and magnitude of the harm threatened by continued contumacy.

It is well established under Michigan case authority that any jail confinement for contempt is conditional upon the contemnor's continuing in his contempt. A party thus has the opportunity to secure his release by purging himself of his contempt. Furthermore, a state court is required to find that the defendant is or could be of "sufficient ability" to comply with the contempt order. *Sword v. Sword*, 59 Mich. App. 730, 734, 229 N.W.2d 907 (1975). Such ability to comply is also prerequisite to a sentence of coercive commitment. *Borden v. Borden*, 67 Mich. App. 45, 50, 239 N.W.2d 757 (1976). When the purpose of the court is to coerce compliance, "it must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947); *In re Contempt of Dougherty*, 429 Mich. 81, 98, 413 N.W.2d 392 (1987).

If the Macomb County Circuit Court had held a contempt hearing, it would have had the opportunity to take testimony from witnesses and petitioners themselves to find out if petitioners could even comply with the contempt order

or whether there were any unforeseen or extenuating circumstances which prevented compliance, such as an order from another court or state regulations mandating certain behavior. The circuit court had no knowledge whether compliance with its order was even reasonably possible before it ordered that petitioners could possibly be incarcerated.

The circuit court also made no determination of the character and magnitude of the harm threatened by continued contumacy. The February 27, 2008 Opinion and Order is wholly devoid of any language which would indicate what harm has befallen respondent due to the fact that there may be some compost on petitioners' farm. App. 3a-9a. If the circuit court had held an evidentiary hearing, then it could have reasonably made a determination as to whether the alleged compost that remained had any dangerous propensities (which it does not), and could have learned that there were no complaints of odor or any other nuisance for more than three years. Because there is no evidence in the record regarding the character and magnitude of harm that the alleged compost on site causes or what was the character and magnitude of the harm threatened by continued contumacy or whether petitioners could comply with the contempt order, the circuit court abused its discretion and violated petitioners' due process rights in ordering that they could serve jail sentences until petitioners complied with the contempt order. The state appellate courts accordingly erred in not setting aside this contempt order. Petitioners therefore respectfully request that this Court grant review in this case.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 2008

Order

April 11, 2008

Michigan Supreme Court
Lansing, Michigan
Clifford W. Taylor
Chief Justice

136134
& (12)
(13)(14)
(15)(16)

Michael F. Cavanaugh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

MACOMB TOWNSHIP,
Plaintiff-Appellee,

v

SC: 136134
COA: 384479
Macomb CC: 95-004372-CZ

RONALD MICHAELS and
DOLORES MICHAELS,
Defendants-Appellants.

_____/

On order of the Court, the motions for immediate consideration are GRANTED. The application for leave to appeal the March 28, 2008 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motions for stay are DENIED as moot.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 11, 2008 /s/ Corbin R. Davis
Clerk

Court of Appeals, State of Michigan

ORDER

Elizabeth L. Gleicher
Presiding Judge

Mark J. Cavanagh
Deborah A. Servitto
Judges

TOWNSHIP OF MACOMB V RONALD MICHAELS

Docket No. 284479

LC No. 95-004372-CZ

---

The Court orders that the motion for immediate consideration is GRANTED.

Pursuant to MCR 7.205(D)(2), the Court orders that the portion of the Macomb Circuit Court's February 27, 2008 opinion and order is VACATED to the extent the court ordered defendants to pay a fine which exceeded the statutory maximum of $7500 set by 600.1715(1). The circuit court imposed a fine of $250 per day for each day of noncompliance after December 31, 2007. The court may not exceed the statutory limit by assessing fines on a daily basis in this manner. *In re Contempt of ACIA*, 243 Mich App 697, 719; 624 NW2d 443 (2000); *In re Contempt of Johnson*, 165 Mich App 422, 429-430; 419 NW2d 419 (1988). Defendants' fine is therefore limited to a total of $7500.

In all other resects the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

The motion for stay is DENIED as moot.

Servitto, J. did not participate.

[A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on March 28, 2008]

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

TOWNSHIP OF MACOMB,
Plaintiff,

vs. Case No. 1995-4372-CZ

RONALD MICHAELS and
DELORES MICHAELS,
Defendant,

_____/

OPINION AND ORDER

Plaintiff moves for an order finding Ronald and Delores Michaels in contempt of the June 30, 2004, consent judgment.

Plaintiff filed the instant action on September 20, 1995. In the *Opinion and Order* dated February 18, 2004, the Court set forth the facts and history pertaining to the instant action; the Court will not reiterate the entire background. Plaintiff first brought a complaint against defendants in 1991, complaining that their 300-acre farm, zoned agricultural, is site of a large-scale composting operation. Residents of the surrounding area complained about the odor. The initial action ended in 1993. Plaintiff's instant action sought declaratory judgment (count I) and injunctive relief (count II) and alleges nuisance per se (count III). After ten years and much negotiation, the parties finally entered into a Consent Judgment on June 30, 2004. Plaintiff now moves to hold defendants in contempt for violating the consent judgment.

Plaintiff contends the consent judgment required defendants to remove all compost materials from the property in Macomb Township no later than December 31, 2007. Plaintiff avers that as of January 2, 2008, defendants have 250,000 cubic yards of compost on site. Plaintiff argues, first, that Delores Michaels has admitted under oath that all materials must be removed by December 31, 2007. Second, plaintiff contends that the phrases "compostible materials" and "composting materials" as set forth in the consent judgment include "finished compost." Third, plaintiff asserts that the transcript of the settlement agreement placed on the record on June 24, 2004, states that all materials associated with composting must be removed from the site by December 31, 2007.

In response, defendants aver that the consent judgment distinguishes between "compostible materials," "composting materials" and "finished compost." Defendants agree that the consent judgment provided that defendants would cease receiving all "compostible materials," including leaves, grass, yard clippings, etc by December 31, 2005. Defendants contend that this does not include "finished compost." Defendants assert this is so because another paragraph provides that "finished compost" may be sold commencing with the effective date of the consent judgment. Defendants argue, first, that the Court may not re-write the consent judgment; and, second, parole evidence is not allowed, as the contract here is clear.

"A consent judgment is the product of an agreement between the parties." *Sylvania Silica Co v Berlin Twp, 186* Mich App 73, 75; 463 NW2d 129 (1990). An agreement to settle a pending lawsuit is a contract to be governed by the legal principles applicable to the construction and interpretation of contracts. *Walbridge Aldinger Co v Walcon Corp,* 207 Mich App 566, 571; 525 NW2d 489 (1994).

The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand),* 463 Mich. 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent from the plain language of the contract itself. *Old Kent Bank v Sobczak,* 243 Mich App 57, 63; 620 NW2d 663 (2000). When determining that the parties' agreement is, the court should read the contract as a whole and give meaning to all the terms contained within the policy. *Heath v State Farm Mut Auto Ins Co,* 255 Mich App 217, 218; 659 NW2d 698 (2002). If contract language is clear and unambiguous, its meaning presents a question of law for the court to determine. *UAW-GM Human Resource Center v KSL Corp,* 228 Mich App 486, 491; 579 NW2d 411 (1998). On the other hand, where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Id.* Where a contract is not ambiguous, evidence of custom and practice is inadmissible. *Independence Twp v Reliance Building Co,* 175 Mich App 48, 54; 437 NW2d 22 (1989). The failure to define a contract term does not render the contract ambiguous. *Henderson v State Farm Fire & Casualty Co,* 460 Mich. 348, 354; 596 NW2d 190 (1999). Rather, the terms of a contract must be interpreted in accordance with their commonly used meanings. *Id.*

The pertinent paragraphs of the Consent Judgment are set forth as follows:

1. The Defendants, RONALD and DOLORES MICHAELS, shall permanently cease receiving from off-site sources, leaves, grass, yard clippings and other compostible materials at their farm in Macomb Township and the composting also will be closed, as of December 31, 2005.

2. All composting material shall be removed from the composting operation no later than December 31, 2007.

5. Any finished compost may be removed in bulk from the site and sold commencing with the effective date of this Consent Judgment.

Reading the contract as a whole, and applying only reasonable interpretation to its terms, the Court is persuaded that the consent judgment is unambiguous, and stands for the proposition that all compostible/composting/finished compost must be removed by December 31, 2007. If taking the defendants interpretation that "compostible," "composting" and "finished compost" are all distinct terms referring to different materials, this would mean that the defendants agreed to enter into a contract whereby they would accept raw materials for composting then turn around two years later and get rid of those materials – a pointless exercise. That is, if "finished compost" is not included in the term "composting material," defendants agreed to take materials for compost until December 31, 2005, only to have to get rid of half-rotted "composting material" by December 31, 2007. It also does not make sense that defendants would have agreed to getting rid of all "composting material" two years later if two years is not enough of duration to break down the compostible material into finished compost. (And, indeed, defendants argue that only "finished compost" remains at this point in time.) The Court is persuaded the only reasonable interpretation is that "finished compost" falls within the meaning of "compostible material." The Court is persuaded that the word "finished" is included in the fifth paragraph merely to signify that it can be sold at that stage. Thus, the Court is persuaded that the consent judgment reveals that it was the intent of the parties for defendants to have removed all composting materials – including finished compost – by December 31, 2007. Defendants are in breach of the consent judgment.

The next question is what is the proper remedy in such a circumstance. In *Trendell v Solomon,* 178 Mich App 365, 368-369; 443 NW2d 509 (1989), the Court reviewed other states' as well as federal decisions to conclude that once a consent judgment is entered, it has the same force and effect as a litigated judgment, and the proper remedy for its breach by either party is judicial enforcement. (See, also, *Charter Tp of Orion v Prieskorn Golf Enterprises, Inc,* unpublished opinion per curaim (sic) of the Court of Appeals, decided September 7, 1999 [Docket Nos. 204339, 213055], relying on *Trendell.*)

MCL 600.1701, the general contempt statute, permits "[t}he supreme court, circuit courts, and all other courts of record...to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct" in enumerated circumstances. Those persons and circumstances include parties to actions for disobeying any lawful order, decree, or process of the court. MCL 600.1701(g). The sanction a trial court may impose to punish contemptuous conduct is limited by MCL 600.1715, which provides:

> (1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than $250.00, or imprisonment which, except in those cases where the commitment s for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 30 days, or both, in the discretion of the court.
>
> (2) If the contempt consists of the omission to perform some act or duty which is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty which shall be specified in the order of commitment and pays the fine, costs, and

expenses of the proceedings which shall be specified in the order of commitment. [FN12]

When a court seeks to compel a contemnor to comply with its order requiring or forbidding some particular act, the court may use the *coercive* sanctions permitted by civil contempt, including a fine of up to $250.00, a jail term of no more than thirty days that expires when the contemnor purges the contempt, and compensation to others who sustain losses because of the contemptuous conduct. MCL 600.1715; MCL 600.1721; see also *In re Contempt of Auto Club Ins Ass'n,* 243 Mich App 697, 711-712; 624 NW2d 443 (2000). Civil contempt ends when the contemnor complies with the court's order or is no longer able to do so and pays and fines or costs for the contempt proceedings. MCL 600.1715(2). This ability to cure contempt, essentially making other sanctions unnecessary, is why the contemptuous behavior must persist at the time of the contempt hearing in order for the trial court to impose a coercive sanction. *In re Contempt of Auto Club,* at 712.

At the hearing on the current motion, defendants did not (and, in brief, still do not) deny that they have not removed all composting material from their farm. Thus, the Court is persuaded the requisite "preponderance of the evidence standard" has been met. See, *In re Contempt of Auto Club,* at 712. Therefore, the Court finds defendants in civil contempt. Defendants are ordered to pay a fine of $250 per each day after December 31, 2007, that they have not complied with the consent judgment's mandate to remove all composting materials, including "finished compost," each day being a separate act of contempt. The Court further orders that defendants will be ordered held in jail after thirty days from the date of this *Opinion and Order* if they still have not complied with this Court's order by that time. Finally, defendants shall pay plaintiff's cost and fees for bringing the instant motion.

For the foregoing reasons, plaintiff's motion for an order finding Ronald and Delores Michaels in contempt is GRANTED. Defendants shall pay, collectively, a fee of $250 per day after December 31, 2007, that they have not removed all compostible material from their property. It is further ordered that defendants will both serve time in jail after thirty days of this *Opinion and Order* if they have continued to fail to comply with its terms. Finally, the Court orders defendants are liable for plaintiff's fees and costs for bringing the instant motion. Plaintiff shall submit an itemized bill of costs. In compliance with MCR 2.602(A)(3), the Court states this case had been resolved previously and remains CLOSED.

IT IS SO ORDERED.

/s/ Hon. Diane M. Druzinski, Circuit Court Judge

Date: Februar27, 2008

[stamped as a True Copy, CARMELLA SABAUGH, COUNTY CLERK, by Patricia K. Jones, Court Clerk]